Supermajority Legislative Requirements and the Constitutional Court in Chile

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Introduction

This piece addresses the supermajority legislative requirements in Chile and the constitutional jurisprudence that has developed around them. The argument takes as an assumption that requiring a supermajority for the passage of laws is, in principle, contrary to democratic ideals. This reflects the idea that democratic process cannot require, in principle, for a proposal to pass into law, more than half plus one of the votes that can be cast, that is, the votes of half plus one of the active members of the assembly delegated to take the legislative decision in question. Not the votes of 4/7 of the representatives as is required in Chile for a certain type of laws referred to as Constitutional Organic Laws (*Leyes Orgánicas Constitucionales*, henceforth LOC). The Chilean case moreover runs further against the idea of democracy understood as majority rule by requiring that modifications to any LOC passed by a 4/7 majority be subjected to the preventive controlabstract – of the Constitutional Court.

It should be emphasized that the focus is on the supermajority requirement for the passage of laws, not for constitutional amendments. In the latter case, supermajority requirements are reasonable. If the Constitution is understood as a pact made between the majority and minority, it does not seem misplaced to give the latter a special position in the negotiation. In constitutional negotiations, the basic rules of the game are defined, which warrants the subsidy for the minority. Yet there is less justification for continuing

the subsidy in every round of the game, especially considering that there is a system for judicial review in the Constitutional Court.

Requiring more than half plus one of the votes to pass laws therefore implies giving the minority a veto power analogous to that enjoyed by the minority when constitutional reforms are at issue. Why? What for, if its concerns have already been incorporated into the Constitution?

Böckenförde developed a strong argument in favor of majority rule for the passage of laws. It is worth citing at length:

> The identification of majority rule as internally required for democracy follows both from the principle of freedom and the principle of self-determination, as well as the principle of democratic equality. For democratic freedom of participation to be available to all citizens, and not only for a few, the consent of the majority, at least, and justly, must be necessary to implement any determined substance into the reigning order. Requiring any less would represent a bias against those opposed to the motion, while requiring more than a majority would be a bias against those in favor. The same holds out of consideration for equality. If every citizen possesses the same political rights of participation, then in order for everyone to have the same opportunity for political influence every political opinion must be given equal weight. No qualitative difference, whether it be based on the intensity of participation in the democratic political process or on the old distinction in canonic law between *pars sanior* and *pars maior*, can be justified in this case. Assuming democratic equality, votes – from a legal perspective – can only be counted, not weighted (Böckenförde, 2000: 92-93).

Therein lays the key: votes can only be counted, not weighted. The supermajority requirements imply weighting the votes in relation to each other, as they confer to the minority the possibility of vetoing motions that have majority support. Hence, for example, if a legislative body has 120 members and absolute majority is required to pass a motion, 61 votes are required. If we assume that the majority consists of 61 votes and the minority of 59, each vote in the majority and in the minority counts equally, not any

less nor any greater. But if a supermajority requirement is imposed, such as one requiring 4/7 of the votes to pass motions, then 69 votes are required, not 61. Because 61 still represents the majority, however, the 59 votes in the minority now count as 1.12 votes in the majority, that is, more than one. Likewise, the 61 majority votes now only count as much as 0.88 minority votes; that is, less than one. What is the grounds that justifies this alteration for certain legislative reforms – ones that are not constitutional in nature?[1]

The phenomenon just described is the basis of this text: the supermajority required to enact LOC legislation appears to be a democratic anomaly. The anomaly is aggravated by the fact that LOC legislation must first pass the prior review of the Constitutional Court (the *Tribunal Constitucional*, henceforth TC), whose members do not respond to the electorate. The practice established by the TC in the exercise of this task, which is analyzed below, suggests that the argument that the supermajority requirement is a democratic anomaly is indeed plausible.

To develop the argument, this paper is divided in three sections. In the first section, the genesis of the supermajority requirement in place in Chile is described. This section is subdivided into parts examining the role of the 1980 Constitution (1.1), the pertinent discussions of the Ortúzar Commission (1.2), the pertinent discussions in the State Council (1.3), and the working group that revised the final text of the 1980 Constitution within the walls of Diego Portales (1.4).

[1] A reflection of the democratic impertinence of the supermajority requirements for legislation, following Böckenförde, and with particular reference to the LOC can be found Atria (2009). One can also be found in Correa (2005: 740-741), with regards the jurisprudence developed by the TC over 2004. Other critiques of the LOC, from similar points of view, can be found in: Muñoz (2005), (2006), Aldunate (2005: 77), and Zapata (2008: 395-458). For uncritical and, in some cases, laudatory assessments of LOC, see: Bulnes (1984), (2001); Caldera (1982), De la Fuente (1991-1992), Ríos (1983), Varas (1984) y Verdugo (2009). For a comparative perspective, see, among others, McGann (2002).

In the second section the practice that has evolved in the TC with regards the supermajority requirement since it began in 1981 is considered. Here the criterion for analysis is the manner in which the TC has conceived its competence regarding the legislative process when amplifying or restricting the scope of the supermajority requirements referred to by the Constitution when establishing the LOC. Where the court amplifies the scope, it demonstrates an expansive attitude. When it restricts their scope, its attitude is self-constrained. Returning to the fundamental argument of this paper, an expansive attitude aggravates the democratic anomaly, while a self-constrained attitude reduces it. The second section is subdivided into a quantitative description of the court's actions (2.1) and an analysis of the reasoning put forward by the TC, for the purpose of characterizing its attitude in terms of this paper's argument. Special emphasis will be put on one specific issue: the composition of personnel of organs to which the Constitution expressly refers with regards the LOC (2.2).

The third section presents, at last, the conclusion.

1. The Rule

The supermajority requirement is relatively new in Chile. It was only established by the 1980 Constitution, which introduced for the first time a set of Constitutional Organic Laws (LOC) into our legal system. These are the laws that require a supermajority equivalent to 4/7 of the members in both chambers of Congress for passage.[2]

[2] There are 21 LOC that cover the subjects listed in the Appendix on page 25.

Thus, for example, since in Chile there are 120 members of the House of Representatives, 61 votes comprises the absolute majority, while the 4/7 supermajority requirement for the LOC is 69 votes. This requirement is near the supermajority requirement that must be met for modifying the Constitution in Chile, which is 3/5 of Congress, that is, 72 votes. It might be added that there are certain constitutional issues that entail an even higher requirement of 2/3 – 80 votes.

The constitutions prior to 1980 did not have supermajority requirements. Nor did they exist in legislative procedures. The latter, through the rules established, required simple majorities. The LOC only came into being in 1980. How and why were they made part of our legal system?

To respond to this question, we must turn to the origins of the Constitution in the Acts of the Ortúzar Commission, which elaborated its text from 1973 to 1978, and in the State Council, which continued the work from 1978 to 1980.

1.1 The Ortúzar Commission

The first precedent for the LOC can be found in the Commission for the Study of the New Constitution, or, as it is more widely known, the Ortúzar Commission, after the name of its President, Enrique Ortúzar. This commission was designated by the military junta in the days following the coup which removed Salvador Allende to prepare a new constitutional text. It worked from 1973 until 1978, the year in which it produced a draft that was sent to the State Council for consideration.

An air of mistrust towards the will of the people, as manifested in the treatment of majorities, blew through the Ortúzar Commission. That will was seen *a priori* as shifting,

capricious, fickle. For this reason, the entire original text of the 1980 Constitution can be seen as a broad effort made to contain, neutralize, or compensate for the political will of the majority. This mistrust materialized in different forms. Constitutional control and judicial review, for example, were broadened and strengthened. In addition to the Judiciary's power to annul legislation that was provided in the 1925 Constitution, the 1980 Constitution created a Constitutional Court (TC), with greater powers over legislation. For now, as has been mentioned, any LOC must necessarily obtain the approval of the TC prior to passage.

This is the context in which the LOC were created in the Ortúzar Commission. In 1977, for example, Enrique Ortúzar declared: "In truth, everyone, unanimously, has always eagerly desired a brief Constitution that only incorporates the most fundamental norms. On one side, however, the experience of the former regime, the need to be on guard with respect citizen rights, the need to give greater strength to certain legal precepts in order to prevent the possibility that they might in the future become unknown … led the Commission … to introduce dispositions that everyone esteemed in principle perhaps should not be given constitutional ranking" (CO: 297 14/06/77: 350).[3]

In doing so, they turned to the Constitution of the Fifth Republic of France promulgated in 1958 under General De Gaulle. They did not, however, copy it exactly. They are identical with regards the regular organic-constitutional aspects and also in as much as they are laws that must be submitted for review of constitutionality prior to passage (there, by the Constitutional Council, here, by the Constitutional Court or TC).

[3] The references to the Acts of the Ortúzar Commission are noted as follows: CO (*Comisión Ortúzar*): session number, session date: page number in the document in .pdf format accessible at the National Library of Congress website: http://www.bcn.cl/lc/cpolitica/actas_oficiales-r

But the two texts are not identical from the primary focus of this analysis, that of supermajority requirements. In France these laws are not subjected to supermajority requirements, but rather only require for passage absolute majority (half plus one of the voting members).

The Ortúzar Commission finished its work in 1978. The project for the new Constitution then passed to the State Council. Distrust in the electoral majority and the danger of delirium attributed to universal suffrage was also present in this second organ; sometimes even more intensely than it was in the Ortúzar Commission, as will be shown.

1.2 The State Council

This body began to discuss the draft produced by the Ortúzar Commission in 1978 and worked on it for nearly two years, until July 1980. Subsequently the text was given to a group that, under the auspices of the Governing Junta, worked on it intensely for two months, until the plebiscite of September 1980. Unfortunately this group did not leave behind records of its work.

As indicated above, the air breathed in the State Council was even more explicitly distrustful of the democratic majority, or, as it was commonly said, of universal suffrage. The words of the Council President, Jorge Alessandri, former President of the Republic, are only too eloquent:

> Universal suffrage has been accepted, in spite of its being considered a sacrilege in the birthplace of democracy. In Ancient Greeks, it was thought that the right to participate in the public sphere was reserved exclusively for virtuous men, a concept which is the antithesis of universal suffrage. When time is of essence, we should eliminate to the degree possible its noxious influence, so that matters of

> importance are resolved by a select few. No more can be done" (CE: 56, 28/11/78: 313).[4]

It is noteworthy that in the State Council there were positions as or more opposed to universal suffrage. The latter position was represented by two of its members: Pedro Ibáñez O. and Carlos Cáceres. The former, for example, proposed:

> Avoiding as much as possible universal suffrage and attempting to keep the power in the orbit of the Executive and the President of the Republic, in order to furnish the regime with cohesion and continuity; this is the only way that political or public careers can be based on achievement and merit, and not on flattery, promises, and deceit.

He goes on to propose an institutional framework for this:

> [N]ew systems to generate political power based on a diversification of their origin (different sources or colleges for the designation or election of mayors, representatives, senators, the President of the Republic, and the State Council); and a dismemberment of the systems, terms, and years in which the magistracy turns over in order to avoid or at least obstruct the return of partisanship" (CE: 55, 21/11/78: 303, 307).

Hence, the State Council maintained the requirement of an absolute majority of sitting representatives for the LOC (CE: 88, 04/09/79, 572). This means that, from a procedural point of view, the only difference between the LOC and ordinary laws was the requirement that LOC undergo prior constitutional review by the Constitutional Court (TC). The supermajority requirement, then, was created by the group that was designated by the Governing Junta to undertake the final revision of the draft of the new Constitution produced by the State Council. This comprised the truly political revision by the regime.

[4] References to the Acts of the State Council are noted as follows: CE (Consejo de Estado): session number, session date, and page number in Arancibia *et al* (2008).

1.3 The Working Group in the Diego Portales Building

The working group labored intensely at the headquarters of the Executive, the Diego Portales Building, which in 2009 became the Centro Cultural Gabriela Mistral, in July and August 1980, revising the text which was finally subjected to parliamentary approval on September 11 of the same year. Several modifications were introduced. Among them was the supermajority requirement for LOC, along the lines discussed by the Ortúzar Commission years earlier: 3/5 of voting representatives would be required to carry such measures.

This decision fit perfectly in the atmosphere of mistrust of the majority, of "universal suffrage," that had permeated the entire process of constitutional revision from 1973 until the 1980 Constitution. In truth it can be seen to represent the culmination of the debate over majority requirements. It is unfortunate, then, that the working group left no minutes or any other record of its work that would permit a more accurate understanding of it.[5]

The 3/5 requirement was changed in 1989. Following the 1988 plebiscite, there took place a constitutional reform negotiated with the opposition that had achieved victory in the referendum and that would form the coalition that would lead the country for twenty years starting in 1990, the *Concertación*. Among the reforms introduced in 1989 was the reduced legislative majority requirement. Its intensity dropped a degree: from 3/5 to 4/7 of the voting representatives.

[5] The description of this group found in Cavallo *et al.* (1997: 269-273) is very interesting.

The evolution of the supermajority requirement thus summarized, the paper will turn to the characterization of the practice of the Constitutional Court (TC) in respect to the requirement.

2. In Practice

All of the decisions of the TC relevant to LOC were examined in order to characterize the court's actions. The period examined begins with the decision handed down on November 26, 1981 and runs through TC/1704 published April 27, 2010. There are in all 430 decisions. They were read keeping in mind the relationship between LOC and ordinary laws, in order to determine whether the TC increased or decreased the scope of the LOC, reducing or broadening, respectively, the domain of ordinary laws. As was explained at the outset, if the domain of the LOC is increased, so increases the democratic anomaly represented by legislative supermajority requirement, whereas the anomaly is reduced if the domain of LOC is limited.

The decisions of the TC concern many different aspects of the LOC, but one comes up more frequently than the others: appointments to posts in public services. This issue provides a good indicator for the attitude of the TC, as there are two instances where the Constitution explicitly refers to staffing appointments as a matter of LOC: when it refers to the LOC concerning the Armed Forces (Articles 102 and 105) and when it refers to the LOC concerning the TC itself (in the final subsection of Article 92). It is only in the latter case that appointments are specifically mentioned: "Its organization, operation, and procedures will be established by constitutional organic law which will also determine the appointment, remuneration, and status of its personnel." In the case of

the Armed Forces, mention is made of requirements for incorporation into the staff, but not of appointments.

This is consistent with the fact that the general rule in matters of staff appointments is provided by common law. The bulk of staff appointments for State posts are made through legislation of the common type. That is why it is a good indicator for this analysis, as it provides a case for the question of how the TC has understood the exceptionality and limited character with which the Constitution refers to staff appointments. Let us look at it.

2.1 The Initial Self-Constrained Attitude

The jurisprudence of the TC surrounding the LOC began with the entrance into force of these laws at the beginning of the 1980s, in full swing of the dictatorship. The first time that the TC considered them was November 26, 1981, in its decision file number 4.[6] The TC emphasized the need for the interpreter to determine, case by case, the LOC character of legislative regulations. The key to do so, it added, lay in the "topics" that the Constitution explicitly reserved for regulation through LOC. It advanced a formula that would eventually become important in the jurisprudence: these matters are defined through the definition of two aspects: their "essential substance" and their "essential complementary elements." We will return to the formula.

In this initial decision, the TC reaffirmed its role as interpreter of the character of the LOC yet, at the same time, this role was conceived in a relatively limited fashion,

[6] From this point on, the decisions of the TC will be abbreviated to indicate the file number or section number in the following way: TC/number for files (*rol*) and C/number (*considerando*). This case, accordingly, would be abbreviated TC/4.

relatively self-constrained. It dealt with a projected law to partially modify the legal status of notaries. In Chile notaries are associated with the Judicial Branch, as auxiliaries in the administration of justice. The question, then, was determining whether constitutional disposition requiring that "the organization and attributes of the courts necessary for the timely and effective administration of justice over the entire territory of the Republic will be determined by constitutional organic law" applied in this case. If it was applicable, then an LOC was necessary.

The majority of the TC held that it was not applicable. Their argument is interesting:

> Without doubt the phrase "organization and attributes of courts" employed in Article 74 of the Constitution refers to the basic structure of the Judiciary Branch where it is not regulated by the Basic Charter, as it makes reference to what is necessary "for the timely and effective administration of justice over the entire territory of the Republic."

And then comes expression of its self-constrained attitude:

> The constituent delegate him or herself has taken it upon themself to affirm that not everything related to this topic falls under the scope of constitutional organic law, since it reserves the competence of the common law, in Article 60, No. 3, to regulate precepts "that are the object of codification, whether civil, commercial, procedural, criminal, or otherwise," and in No. 17 of the same article leaves it to common law to designate the city in which the Supreme Court will hold sessions. (C/6)

Further on, it reaffirms this stance:

> [I]t is obvious that not every specific task can be elevated to the category of essential complementary elements of constitutional organic law which regulates the organization and attributes of the courts. (C/7)

This initial self-constrained attitude towards the LOC by the TC continued for some time. By defining the scope of the LOC and, at the same time, its very competence in interpreting it, the TC elaborated a formula using potentially expansive variables: "essential substance" and "essential complementary" elements of the subjects designated in the Constitution for regulation by LOC. These include not only the nucleus of these subjects (their "essential substance"), but also peripheral aspects (their "essential complementary" elements). Yet this potentially broad formula was applied with reserve by its creators.

Another decision from the first year, TC/7, handed down in December of 1981, also reflected this reserved approach. Again, the subject under consideration concerned the Judiciary Branch: modifications were proposed to change the way writs were sent in the jurisdiction of the Court of Appeals of Pedro Aguirre Cerda. Yet again it was a matter – as in the case of the notaries – relatively tangential with regards the rendering of justice. But was it an issue that fell under the "organization and attributes of the courts that were necessary for the timely and effective administration of justice over the entire territory of the Republic," as mandated for regulation by LOC by the Constitution? As in the previous case of the notaries, the majority of the TC held that it was not an issue requiring a LOC. Why? Because the issues requiring LOC mandate were limited to questions of the "basic structure" of the Judiciary, which implicitly affirmed that aspects unrelated to basic structure, such as the regulations for notaries and the distribution of writs, were matters for the common law, not the LOC (C/10).

Things would change, however. Early on the TC also begins to display signs that its constrained approach to the LOC, that of marking off the boundary between LOC and

the common law, was not one that was entirely established. An interpretive criterion which has been called “dismemberment” is one of those signs.

2.2 “Dismemberment”

On December 22, 1981, on the heels of the decision just discussed, the Court handed down another decision – TC/22 – that would have expansive consequences with regards its competence in matters of LOC. With this decision the TC embarked on a path that has been, rightfully, criticized in the literature, especially by Buchheister and Soto (2005): the path of “dismemberment” of the LOC.

“Dismemberment” can be contrasted with the “unity” of the LOC. The unity of constitutional organic laws arises from conceiving of these normative standards as closed bodies. That is to say that the subjects requiring LOC regulation must be determined by one sole authoritative text, in one single normative unity. Dismemberment, however, supposes the possibility that the same authoritative text might contain legislation requiring LOC control and legislation reverting to the common law.

The TC itself had preached the unity of the LOC in its decision TC/7 of December 22, 1981, stating that the objective of the LOC, “is developing in a harmonized and systematic text the constitutional precepts in those areas that the constituent assembly designated for such laws” (C/8). But before going much further, in decision TC/10, the court removed any possibility of “a harmonized and systematic text,” declaring:

> That this Court refrain from addressing the transitory third article of the project […] for, in accordance with the second subsection of the second transitory disposition of the Constitution, the matter in question is not subject to constitutional organic law, but rather to the Mining Code (C/3).

Hence, by taking a position with respect to a legislative body regarding subjects that the Constitutions states pertain to LOC – in this case, mining concessions – the TC accepted the Governing Junta's decision in the sense that said body contained dispositions that were not of LOC character. Subsequently it also came to pass that some dispositions requiring LOC treatment were identified or inserted into normative bodies comprised for the greater part of common law dispositions.

"Dismemberment," the interpretive criterion that allowed dispositions reverting to LOC to be mixed in with dispositions of ordinary law, facilitates the adoption of an expansive attitude by the TC, as it makes it possible for the court to intervene in a very broad range of activities of legislative power.

And so it was that in 1985 the TC displayed an expansive approach that it would maintain until 1992. One effect was the decision TC/33 of September 24, 1985, which address the LOC project regarding the Electoral Court.

2.3 Towards an Expansive Approach by the TC

This decision was very important and it is not easy, unlike in other cases, to criticize the expansive attitude that can be observed in it, as the attitude adopted by the majority of the TC was operative in the process of democratic restoration. The decision remains, notwithstanding, ironic in the sense that, in accordance with the thesis of this analysis, by adopting a more expansive attitude the TC raises the degree of democratic anomaly. Yet in this case the expansion was operative in making democracy possible. Why?

Obeying closely the wording of the Transitory Dispositions 11 and 27 of the 1980 Constitution, the Governing Junta had proposed an LOC project for the Electoral Court, which it kept apart from the plebiscite that would take place on October 5, 1988 to determine whether Pinochet would remain in power or if free elections would be held. In accordance with the criteria of the Governing Junta and the text of the transitory constitutional dispositions just mentioned, the plebiscite was not to be carried out following the permanent norms of electoral certification established by the Constitution, specifically in Articles 18, 84, 85, and 86.

Transitory Disposition 11 stated: "Article 84 of the Constitution relative to the Electoral Court, will commence its activities on the date determined by the respective law, on occasion of the first election of senators and representatives, and its members must be designated thirty days in advance of this date."

This means that the Electoral Court would not be in operation until after the 1988 plebiscite. Yet the majority of the TC formed a systematic interpretation and, based on that interpretation, held that the following use of the word "law" in Transitory Disposition 27 (.., was not to be understood as an ordinary law, but rather as part of the LOC referred to in Article 18 of the Constitution for a "public electoral system": "The plebiscite must take place not less than thirty nor more than sixty days after the corresponding proposition and will be carried out in accordance with the law." This is how the TC put it in its decision TC/33:

> This "law" to which the cited disposition refers is, without doubt, the constitutional organic law referred to in Article 18 of the Basic Charter, given that it is that precisely that law which must determine the form by which plebiscites

> must be carried out in all of the aspects that are not established by the Constitution. (C/13)

The TC thus enlarged the scope of matters pertaining to LOC. In the project there were also dispositions regarding personnel appointments. No one objected at their being considered LOC and the matter ended there.

This way, however, the TC, with its expansive approach to LOC, also forced the crucial plebiscite of October 5, 1988 to be carried out under the auspices of a functioning Electoral Court and the guarantees that derived from it, such as free access to television advertising time reserved for political campaigning. There can be no doubt that this played a part in carrying out a clean election and peaceful return to democracy. The court's decision in the case is thus understandably difficult to criticize.

One year later, in 1986, the TC maintained its expansive approach in decisions that, unlike TC/33, are easier to criticize. This is the case of decision TC/38, handed down on September 8, 1986, and mentioned earlier in this paper. In it, the TC uses the distinction between "essential substance" and "essential complementary elements" drawn in the previous decision TC/4 in 1981 in order to specify which matters mentioned in the Constitution reverted to LOC. Unlike its previous decisions, however, in which the idea of "essential complementary element" was applied restrictively, in this decision the TC applies it in an expansive manner, extending it to the appointment of personnel in the Electoral Service. Specifically, a matter that was typically subject to ordinary law, such as the personnel regulations for public organs, became in 1986, with decision TC/38, a matter for LOC in the case of the Electoral Service. The TC argued:

> That to conclude in the manner indicated in the previous paragraph, this Court considered the character of Article 18 of the Constitution special in determining that the organization and operation of the public electoral system and the manner by which the election and plebiscite processes will be carried out, in every aspect not predetermined by the Constitution, to be a matter of constitutional organic law, a precept that expresses the will of the constituent assembly that the law in question have constitutional organic standing not only in its essential nucleus but also in those aspects which comprise its essential complement, even though such aspects, considered separately, are proper to the common law. (C/5)

The TC recognized, then, that as a general rule or, as it put it, "considered separately," personnel regulations are a matter of ordinary law. The regulation of the personnel of the public electoral system mentioned in the Constitution, however, is a matter for LOC. Put otherwise, something as internal, as associated to the everyday operation of a public organ, as is the matter of who staffs it, must be determined in detail through the supermajority process of the LOC. The decision was sustained in the following way:

> That, having proven that the norms that regulate the Electoral Service are a matter of constitutional organic law, it must be accepted that so are the norms that regulate its personnel, since this determines the level of staffing needed for the operation of the organization. Separating these issues and supposing that the Basic Charter reserved for constitutional organic law the question of the legal regime regulating the Electoral Service and for the common law the question of the personnel who support it would mean subordinating the efficacy of a constitutional organic law to the discretion of the common law, since nothing would be gained by having a complete legal structure for the Service if, at the same time, it lacked the adequate personnel to carry out its purpose. (C/32)

On November 18, 1986, in decision TC/41, the TC reaffirmed its opinion that personnel regulations for the Electoral Service was a matter of LOC. Six years later, however, in 1992, the TC changed it in that personnel regulations for organs to which the Constitution alludes in reference to a LOC were now considered a matter of LOC.

It should be mentioned that the Constitution refers to different organs with varying intensity as regards matters of LOC. Accordingly, the reference that Article 18

makes to the organization and operation of the public electoral system and the manner in which elections and plebiscites are carried out, “in every aspect not predetermined by the Consititution,” can be understood as particularly intense, justifying the conclusion that the regulation of personnel employed by the public electoral system be a matter for LOC. Here, however, Article 92 of the Constitution should be examined. It determines that the LOC of the TC itself should include the “staff regulations” of the court. This disposition should set the tone for the intensity of the court’s treatment, in the sense that when the Constitution wants personnel issues to be a matter for LOC, it says so explicitly. When the Constitution does not say so explicitly, as in the case of all the other references to matters of LOC, then it should be understood that the issue in question is a matter of common law.

Returning to the jurisprudence, the expansive approach of the TC that began in 1985 was interrupted in 1992 with the reappearance of a self-constrained attitude.

2.4 The Return to a Self-Constrained Attitude in 1992

The decision that marked the return is TC/160, handed down on September 30, 1992. The case was a special one, for it addressed a requirement formulated by the government that is not obligatorily subject to prior review by the TC. In this case, the government raised a question of constitutionality during the processing stages of a bill that made staffing modifications to the General Comptroller’s office. Congress deemed the proposed law to be a LOC, but the government opposed the qualification and brought a request to the TC for consideration. The TC sided with the government, qualifying the bill a matter of ordinary law. Yet in order to do so the court had to address its decisions

TC/38 from 1986 and TC/33 from 1985 that formed an inverse, expansive, precedent. How did it do this?

The court argued that the nature of the decisions TC/38 and TC/33 was exceptional due to the exceptional character of the electoral system and the manner in which it is consecrated by the Constitution. The precedent set in 1985 and 1986 thus circumvented, the TC adopted the self-constrained approach that has been observed in its first decisions. To restrict the applicability of LOC to issues of personnel and staffing, the court held:

> That it is for this reason that when the Constitution ascribes the organization and operation of a Government Branch or of an autonomous organism to constitutional organic law, the organic legislators cannot take on or intervene in all of the details that this supposes, and must limit themselves to outlining the basic or fundamental structure of those institutions in order to attain expeditious functioning order in practice. (C/10)

In order for a law to have LOC character, the TC concluded, there has to have been an explicit declaration of such in the constitutional text. If there is not any, it is assumed that the matter reverts to ordinary law, not LOC. The TC thus reversed its precedent. One year later, in 1993, the majority of the TC held to this approach in decision TC/171.

This decision addressed a bill that would create Local Police Courts in several districts. Congress sent almost the entire bill for constitutional review as a LOC. Yet the majority of the TC held that several of its dispositions were not a matter of LOC (such as one that regulated the courts' shifts), since they did not involve the "basic structure" of the Judicial Branch. It thus returned to what it had maintained very early on, in its 1981 decision TC/4.

Moreover, the TC seemed to remain committed to the new, more self-constrained precedent which resembled its first decisions but had been displaced by the expansive precedent established from around 1985 onward. Decision TC/255 of May 20, 1997 clearly demonstrates the self-limiting manner in which, at that time, the TC viewed its task with regards LOC.

In this case, the TC faced a bill which sought to improve the compensation of certain professionals in the field of education. Congress requested it carry out the prior review germane to LOC. The TC refused to review the bill because it considered its properties to be outside the ambit of LOC, even though it touched the issue of municipalities (the professionals in question were teachers in municipal schools), a category that does revert to LOC. It refused to issue an opinion regarding the bill's constitutionality as it esteemed that the bill was not a matter for LOC.

The TC also displayed this self-constrained attitude in other decisions in 1997. One was TC/257 (September 2, 1997). Congress sent a bill for review that concerned job training and employment. One of its dispositions created an Office of Labor Information in municipalities, which is referred to in the Constitution as a matter for LOC. The TC, however, did not consider the new department to form part of the issues proper to LOC.

Two years later, concerning a LOC bill that established the Public Ministry, the TC reiterated its commitment to a self-constrained approach and a quite limited vision of the scope of LOC. The decision in question is TC/293 from September 22, 1999:

> […] that the norms of interpretation employed must be taken up prudently, because in some fashion they necessarily lead us to expand the scope of the application of constitutional organic laws beyond what is required and permitted

> by the Constitution, given that doing so would deprive our legal system of a balanced and suitable flexibility, in view of the supermajority requirement that is necessary for approving, modifying, or repealing this category of laws. (C/7)

The self-constrained approach reflected in these decisions reemerges quite visibly a decade later. In decision TC/270, handed down on January 26, 2007, with regards the bill that created the 14th Region in Chile, *Los Ríos*, and the Province of *Ranco* (Chile now counts 15 regions, which are subdivided into Provinces), the TC held that personnel regulations for some of the organs, which the Constitution considers matter for LOC, were beyond the scope of these laws: they were held to be questions of ordinary law. The argument was by then well known:

> That Article 6 of the bill in question, which modifies the structure of personnel in the Electoral Service, does not regard the subjects indicated by Article 18 of the Political Constitution as under the ambit of constitutional organic law and, therefore, is not proper to that law. (C/18)

Notwithstanding, in 2008 and 2009 the TC once again gave indication that the expansive approach remains intact, with decisions concerning the staffing of the Electoral Service.

2.5 Yet the Expansive Approach Persists

Decision TC/1135, handed down on May 27, 2008, took up the bill that created positions in the Regional Management of the Electoral Service in the *Arica y Parinacota* Region and established norms concerning political parties in the newly created regions of the country. The TC did not hesitate to qualify its dispositions as matters of LOC:

> That Law 18.583 that determines the staffing of the Electoral Service was approved with the status of constitutional organic law. For this reason, article 1 of the bill under examination, by proposing modification to article 1 of that established legal body, possesses the same quality. (C/7)

It repeated the same argument in decision TC/1508, handed down on October 27, 2009. What is interesting about that decision is the minority opinion that advocated a less expansive approach for the TC in matter of LOC. This minority of judges is in favor of readopting the stance of the court in its first years, the posture that changed in 1985 with decisions TC/33 and TC/38, and was then recuperated in 1992 with TC/160, once democracy had been consolidated. This minority referred to the expansive approach as "obsolete" jurisprudence:

> That we consider that reasons exist for changing the outcome of decision TC/38 and, therefore, for holding the matter of the bill under examination as proper to common law. In the first place, because the decision TC/38 corresponds to a period of Constitutional Court jurisprudence that is now found to be obsolete. (C/3)

Is this jurisprudence really, now, obsolete?

3. Conclusion

It most likely is not obsolete. In any case, this paper concludes with the suggestion that the ideal solution is eliminating LOC from Chile's legal system, so that only majority rule is all that is necessary for legislative action. A simple majority and, if esteemed necessary for matters deemed especially sensitive, an absolute majority, that is, half plus one of the representatives in office. Never again supermajority requirements to pass a law, only to change the Constitution. By eliminating the LOC the abstract but obligatory prior review by the TC that still exists would be eliminated, leaving in place only posterior, voluntary, concrete judicial review. In this way the democratic anomaly of the Chilean Legislative Branch that this text addresses would be resolved.

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Appendix

The LOC in Chile cover:

1. The Central Bank of Chile.
2. The General Bases of State Administration.
3. Police Forces.
4. Mining concessions.
5. The National Congress.
6. The Regional Development Councils.
7. The General Comptroller of the Republic.
8. The Court Statutory Code.
9. Education.
10. Establishes the General Law for Education.
11. Constitutional states of exception.
12. The Armed Forces.
13. Government and Regional Administration.
14. Electoral inscriptions and the Electoral Service.
15. Electoral Service staffing.
16. The Public Ministry.
17. Municipalities.
18. Political parties.
19. Electoral courts.
20. The Constitutional Court.
21. Popular Elections and Vote Counting.